No. 11037

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

JAMES H. COLLINS, SIDNEY FISCHGRUND and CHRISTOPHER E. SCHIRM,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division

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PETITION FOR REHEARING AND ARGUMENT IN SUPPORT THEREOF.

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PETITION FOR REHEARING.

Come now the appellants, James H. Collins, Sidney Fischgrund and Christopher E. Schirm, after decision by this Honorable Court affirming the judgment of the District Court of the United States for the Southern District of California, Central Division, and respectfully petition this Honorable Court for a rehearing upon each and all of the following grounds, to-wit:

I.

This Honorable Court's Opinion Is Based on a Misconception and Misunderstanding of the Facts as Revealed by the Opinion Itself.

(a) The following statements of fact are not borne out by the evidence, and are in direct contradiction of the facts as they actually are:

1. The opinion states, "The participants in the scheme acquired control of Union." The statement is not borne out by the evidence. The participants in the scheme never acquired control, and further attempted to exercise control of Union. [Tr. of Rec. 138-139.]

2. The opinion further states that the stock of Union was "again listed." The statement is not borne out by the evidence. The stock of Union Associated Mines Company was *not again listed.*

3. The opinion further states that the appellants "caused the Plymouth to be organized and they owned and controlled the few issued shares." The statement is not borne out by the evidence. The only convicted defendant who owned stock in Plymouth Oil Company, or any interest in Plymouth Oil Company, was Sidney Fischgrund. Neither of the other convicted defendants had any interest of any kind in Plymouth Oil Company.

4. The statement that Plymouth exchanged certain interests in oil wells to Union Associated Mines Company, to lend a fictitious appearance of worth to the stock of Union Associated Mines Company, is against the evidence, and is not true. [Tr. of Rec. 516.] John H. Wentz, an outstanding petroleum engineer, as is evidenced by his biography [Tr. of Rec. 515], testified that a fifty per cent interest would be worth $60,000.00.

5. The inferences relating to the statement in the opinion, "These dealings could hardly have had any purpose other than to lend a fictitious appearance of worth to the stock of Union * * * with the thought ultimately of unloading it on the public at substantial gains to those engineering the plan," are inferences which are nowhere supported by the evidence; and the law is elemental that

where two inferences can be deducted from a state of facts, one tending to establish fraud and the other not tending to establish fraud, that the inference of clean dealing must prevail. There can be no presumption of guilt by reason of an unusual transaction.

6. The opinion goes on to state: "In the process of the manipulation, progressively higher bids for the stock were made—bids bearing no relation to the merits of the investment." The statement is not borne out by the evidence [Tr. of Rec. 170], wherein A. P. Adkisson testified that his first bid for the stock was 1¢. There was none offered at that price. His next bid was 1½¢, at which time he acquired 10,000 shares (a gross of $150.00). His next bid was 2¢, *"but so far as I know, we never acquired any other stock, other than the 10,000 shares at 1½¢."* If this is rigging the market and causing relatively higher bids for the purpose of defrauding anyone, it is an entirely new theory, which in common sense and logic cannot possibly be used as a precedent.

7. The opinion goes on to state: "The sole object of placing them (the so-called progressive bids) was to induce a rise in the price of the Union stock." The statement is not borne out by the evidence, because the stock never went any higher than, as far as can be ascertained, one isolated transaction at 5¢ per share, with which these appellants were in no way concerned. Union Associated Mines Company stock having an actual worth of approximately 10¢, was certainly not sold with any fraudulent intent if sold at a price of 3¢ per share.

8. The opinion goes on to state: "Other methods characteristic of manipulative schemes were employed, *including the payment of a dividend by Union.*" That statement is untrue because the dividend was paid long

after stock-selling ceased, was not paid for any purpose of selling any stock, and there is not one word of evidence to that effect in the transcript. It is an assumption like all of the other statements complained of herein, which is not borne out by the evidence.

9. The opinion goes on to say: "Enough to say, without further analysis of the evidence, that the conspiracy charged was substantially proven." The facts as written by the Court being based on false premises and a misconception of the testimony and evidence, the conclusions stated cannot be substantiated.

II.

The Circuit Court Erred in Stating the Conclusion That Claimed Errors in the Evidence Were of Insufficient Merit to Warrant Discussion.

(a) Appellants' point No. 1 raised the question as to whether or not the appellants were deprived of constitutional rights given them by Amendment Five of the Constitution and Amendment Six of the Constitution, and said point particularly referred to the right of the appellants to examine into the proceedings held by the Grand Jury in reference to the return of the indictment, and said point is of sufficient merit to warrant discussion.

(b) Appellants' point No. 4 raises the direct question as to the sufficiency of the Conspiracy Count in the indictment and the error of the Court in denying motions for arrests of judgment and to vacate judgments of conviction notwithstanding the verdicts. The authorities cited in support of said point are, in the opinion of appellants, conclusive as to the merit of the point, and therefore the questions of law raised are of sufficient merit to warrant discussion.

(c) Appellants' point No. 5 claims error in admitting into evidence the Minute Books of the Union Associated Mines Company. These Minute Books were neither seen nor prepared by any of the appellants. The objection of hearsay is good. If the objection is good, it is of sufficient merit to warrant discussion.

(d) Appellants' point No. 6 claims error in admitting into evidence the testimony of Harold V. Dodd as to oil production in the district known as "Devil's Den" in California. There was no foundation laid for the admission of that testimony. There was no contention made that any of the appellants had ever claimed production. The testimony was hearsay and prejudicial, and is of sufficient merit to warrant discussion.

(e) Appellants' point No. 7 claims error in admitting into evidence testimony as to the assessed value of unproven oil land, which evidence was admitted for the purpose of establishing value. The ruling of the Court was unquestionably error as determined by a long line of cases, and certainly is of sufficient merit to warrant discussion.

(f) Appellants' point No. 8 claims error in the admission in evidence of testimony of the defendant Frank L. Tucker and of the witness Frank Veloz. The examination of the record discloses that the evidence is, on its face, inadmissible, by reason of the fact that there was no connection of any kind shown between the testimony of the witnesses and any of the defendants; and the record is also clear that any conversations the witnesses had, were with other than the appellants. The point is of sufficient merit to warrant discussion.

(h) Appellants' point No. 9 claims there was error in denying motion to strike certain documentary evidence in oral testimony. The errors are *prima facie* and consist of motions to strike written evidence admitted without proper foundations, oral evidence that is hearsay, and all of the objections were well taken. The matters are of sufficient merit to warrant discussion.

Wherefore, appellants above named pray this Honorable Court to grant a rehearing.

Dated: October 24th, 1936.

DAVID H. CANNON,

Attorney for Appellants James H. Collins and Sidney Fischgrund.

BEN L. BLUE,

Attorney for Appellants Sidney Fischgrund and Christopher Schirm.

Certificate of Good Faith.

We, David H. Cannon, attorney for the appellants James H. Collins and Sidney Fischgrund, and Ben L. Blue, attorney for appellants Sidney Fischgrund and Christopher Schirm, do hereby certify that the above and foregoing Petition for Rehearing is well founded in our judgment and is not interposed for delay.

Dated October 24, 1946.

DAVID H. CANNON.
BEN L. BLUE.

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ARGUMENT IN SUPPORT OF PETITION FOR REHEARING.

I.

We do not intend to reiterate the arguments presented in the appeal, in support of this petition for rehearing. The opinion shows clearly, however, that the true facts involved in the cause were misstated. We state to the Court as officers of the Court, and with the great respect that we have for the Court, that when an appeal is determined upon a misconception of facts, there is no determination of the points raised; that unless the facts are truly and correctly stated, the determination of the law, based as it is on a wrongful premise, does not apply.

In our petition for rehearing we point out nine misstatements of fact in one paragraph. This is, to put it

mildly, extraordinary, and can be likened to the old story of Smith saying to Brown that he had heard that Jones of San Francisco had made $40,000 during the current year. Brown told Smith that he was wrong in four points—in the first place the man's name was not Jones, but Jonas; in the second place it was not San Francisco, it was Los Angeles; in the third place it was not $40,000, it was $4,000; and in the last place he did not make it, he lost it.

II.

In addition to the unmistakable error in misstating the facts, the Court in its opinion waves aside the errors complained of by the trial court with the simple statement that "they do not warrant discussion." The record of this case shows that the trial Judge, after listening to five weeks of evidence, and after the jury had come in with a verdict of guilty, imposed upon these appellants no punishment at all, not even a fine or probation. There must have been a reason for it, and the reason is obvious. There was nothing that was disclosed by the evidence that these appellants did anything knowingly wrongful.

We, as counsel for the appellants, say, and not because we are counsel for the appellants, that we do not know today what these men did that was wrong. The facts are, and we only repeat this because we feel it is pertinent, that the two main defendants were acquitted, and these three minor defendants were convicted, and certainly on a state of facts such as this any errors in the admission of evidence, or the exclusion of evidence, is sufficiently important to warrant discussion, because any of the evidence that was wrongfully admitted may have swerved this jury as it did and may have caused a prejudice that

existed and brought about the verdict. Every safeguard certainly should be given to a man charged with crime in the trial of the case, particularly in a case of this sort.

To show the obviousness of the importance of wrongfully admitted evidence and its possible effect on a juror's mind, let us take one point which, in the opinion of the Court, did not warrant discussion, and that is point No. 7, admitting in evidence the testimony of a County Assessor as to the assessed value of the land for the purpose of determining the value of the land. We herewith cite a few cases stating that such evidence is inadmissible:

San Jose & A. R. Co. v. Mayne, 83 Cal. 566;

Bartlesville Interurban Ry. Co. v. Quaid, 151 Pac. 891 (Okla.), L. R. A. 1918A, 653;

Denver R. Co. v. Heckman, 45 Colo. 470;

Oldenberg v. Oregon Sugar Co., 39 Ore. 564;

Lewis v. Englewood Elev. etc. Co., 223 Ill. 223;

Shea v. Boston etc. R. Co., 217 Mass. 163;

Calahan v. Dunker, 51 Ind. App. 436;

Kelly v. People's Nat. Ins. Co., 262 Ill. 158;

Hanover Water Co. v. Ashland Iron Co., 84 Pa. 279;

Carper v. Risdon, 19 Colo. App. 530 (conversion);

Starrs v. Robinson, 74 Conn. 443;

Anthony v. New York etc. Co., 162 Mass. 60;

American State Bk. v. Butts, 111 Wash. 612;

Putnam v. White, 88 So. 355 (Ala.);

Con. v. Tryon, 31 Pa. Super. Ct. 146;

Ridley v. Seaboard etc. R. Co., 124 N. C. 37;

Girard Tr. Co. v. Philadelphia, 248 Pa. 179;

In re Northlake Ave., 96 Wash. 344;
Dudley v. Minn. etc. Co., 77 Ia. 408;
McNulty v. Lawley, 42 Cal. App. 747;
Yolo W. & P. Co. v. Edmonds, 50 Cal. App. 444.

Conclusion.

We earnestly feel that the appellants have failed to make clear to the Court some of the very vital points in this case, or that because of the voluminous record and briefs, this Court has fallen into error on its concept of the facts, and of the law applicable thereto.

We feel that further oral argument before the Court would be helpful; the principles of law involved are of such importance not only to these appellants but to all persons who may be brought before the Court on similar charges and to the Bar generally, that a rehearing ought to be granted as respectfully suggested.

Dated: October 24th, 1946.

DAVID H. CANNON,
Attorney for Appellants James H. Collins and Sidney Fischgrund.

BEN L. BLUE,
Attorney for Appellants Sidney Fischgrund and Christopher Schirm.